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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 839

EARL E. WRIGHT, JR., ET AL.,

Petitioners,

—v.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

SUBJECT MATTER.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Regulations Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
I—Conflicting decisions in the Circuit Courts of Appeals	6
II—The Decision below is contrary to the applicable decisions of this Court	8
III—The construction of the Pay Act presents a question of Federal Law which has not been but should be settled by the Supreme Court	16
Conclusion	18
Appendix	1a to 9a
Opinion and Judgment Below	1a
Opinion Below in Merlin W. Armstrong, et al.	2a-9a

PAGE

Cases Cited.

Armour & Co. v. Wantock, 323 U. S. 126 ..... 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16

Bell v. Porter (1946), 159 F. 2d 117 ..... 6, 7

Biggs v. Joshua Hendy Corp. (CA 9, 1950) 183 F. 2d 515 ..... 6, 8

Bowers v. Remington Rand (1946), 159 F. 2d 114 ..... 6, 7

Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269, 273 16

Central Missouri Tel. Co. v. Conwell (CA 8, 1948) 170 F. 2d 641 ..... 7, 8

F. W. Stock & Sons v. Thompson (CA 6, 1952) 194 F. 2d 493 ..... 7, 8

General Electric Co. v. Porter (1953), 208 F. 2d 805 ..... 6, 7, 8, 16, 17n

Manhattan Life Ins. Co. v. Wright (C. C. A.) 126 F. 82, 87 16

Missouri, K. & T. R. Co. v. United States, 231 U. S. 112 14

Mitchell v. Strickland Transp. Co. (CA 5, 1955) 228 F. 2d 124 ..... 7, 8

Rokey v. Day & Zimmerman (1946), 157 F. 2d 734 ..... 6, 7

Skidmore v. Swift & Co., 323 U. S. 134 ..... 5, 6, 7, 8, 10, 11, 12, 13, 14, 15

Statutes and Regulations Cited.

Fair Labor Standards Act 7, 14

Federal Employees Pay Act of 1945 (59 Stat. 295) Sec. 201 ..... 2, 3, 5, 7

Navy Civilian Personnel Instructions (N.C.P.I.) .. 2, 3, 16, 17

28 U. S. C. Sec. 1255(1) 1

28 U. S. C. Sec. 1491 1

28 U. S. C. Sec. 2101(c) 1

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

Opinions Below

The opinion of the Court of Claims (Appendix A, *infra*, pp. 1a-2a) is not officially reported. The opinion of the Court of Claims in the companion case of *Merlin M. Armstrong* v. *United States* (Appendix A, p. 2a, *infra*.) is not officially reported.

Jurisdiction

The judgment of the Court of Claims was entered January 14, 1959 (Appendix A, *infra*, pp. 1a). The jurisdiction of this Court is invoked under 28 U. S. C. Sections 1255(1) and 2101(c). The Court of first instance obtained jurisdiction under 28 U. S. C. Section 1491.

Questions Presented

1. In the enactment of the Federal Employees Pay Act of 1945, did the Congress, in the use of the words "employees * * * shall be compensated for all hours of employment" intend to exclude from the hours during which they were required to remain at their post of duty on the employer's premises, on the alert in case of alarm, those hours which they devoted to sleeping and eating.

2. Is the construction that only two-thirds of all the time on duty is compensable a proper construction of the section of the Federal Employees Pay Act providing that all hours of employment in excess of 40 shall be compensable at overtime rates.

Statutes Involved

Federal Employees Pay Act of 1945 (59 Stat. 295):

"Sec. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows * * *."

Regulations Involved

Department of the Navy; Navy Civilian Personnel Instructions, (N.C.P.I.):

"Rule N.C.P.I. 85.4-4:

STANDBY DUTY: When an employee is placed in a standby status he is placed in a duty status which under decisions of the Supreme Court (323 U. S. 126) is subject to compensation. As here used, 'standby

status' and 'standby duty' are synonymous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."[1]

Statement of the Case

Plaintiffs were employed by defendant as civilian fire-fighters at certain Naval installations, for 72 hours in each administrative work week, consisting of three round-the-clock tours of duty, 24 hours on, 24 hours off. They were required to eat and sleep at the post of duty.

Of the 72 hours of employment each week, they were paid for 48 hours; 40 hours at straight time and 8 hours overtime. They received no compensation for the remaining 24 hours of duty (R. p. 6).

They brought suit in the United States Court of Claims to recover overtime compensation for all hours of employment in excess of forty each week (save the 8 hours of overtime paid for) pursuant to the Federal Employees Pay Act of 1945.

Upon pre-trial conference, the facts were agreed upon to the end that both parties might move the Court for summary judgment on the question of liability alone, pursuant to the lower Court's Rule 38(c).

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[1] N.C.P.I. 85.4-4(a):

"'Standby' Defined—Standby means remaining, on orders from competent authority, at or within the confines of a duty station or designated area, in a state of readiness to perform actual work when the need arises or when called."

N.C.P.I. 85.4-3(b):

"An employee in a non-call status is in a non-work status. He is not entitled to compensation for the period he is in a non-call status for the reasons that (1) his time is his own and (2) no restriction or limit is, or may be, placed on his freedom of movement, or his freedom to engage in personal activities of his selection."

The following facts (among others) were stipulated (R. pp. 31-32):

Part B(1) * * *

(c) During each 24-hour tour of duty (plaintiffs) remained and were required to remain at the station, except when official duties required them to be elsewhere on the station.

(d) Were subject to call at all times throughout each 24-hour tour of duty.

(e) Were permitted to sleep from 7 p.m. to 7 a.m., during each 24-hour tour of duty, and were *required to be in bed* by 11 p.m., at which time a *bedcheck was made to insure the fact.*

* * * * *

(g) All hours of employment in excess of 40 hours in each administrative work week were officially ordered or approved.

* * * * *

(i) Plaintiffs * * * were subject to disciplinary action for unauthorized absences from the post during any part of the tour of duty.

Both sides moved, on cross-motion, for summary judgment. Plaintiffs' motion was overruled, defendant's motion was granted and the plaintiffs' petition was dismissed on January 14, 1959 (Appendix A, p. 1a).

Reasons for Granting the Writ

The decision below holding that Federal civilian employees are not employed for those hours devoted to sleeping and eating during the period they are required to remain at their post on the employer's premises, on the alert in case of alarm, and that such hours are non-compensable because they are

not hours of employment, raises an important question of general applicability as to the proper construction and administration of Federal Pay Act with respect to the compensation of Federal civilian employees on standby duty. The decision below construes the Federal Employees Pay Act of 1945 to mean that in all cases only two-thirds of the hours of employment are compensable. Its importance goes beyond the fortunes of this particular case, and presents a question which has not been but should be settled by the Supreme Court.

The Courts of Appeals for the Seventh and Eighth Circuits have rendered decisions on the question which are in conflict with the decisions of the Courts of Appeals for the Fifth, Sixth and Ninth Circuits upon the same question.

An area of uncertainty has been created by the circumstance that the Courts of Appeals in the said circuits have cited as authority for their conflicting views the decisions of this Court in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134.

The Court of Appeals for the Eighth Circuit has answered the question both ways, having rendered two decisions which are in conflict with each other, the later decision being in conflict with the decision of the court below.

The court below followed the decisions in the Seventh Circuit and also cited this Court's decisions in *Armour & Co.* v. *Wantock*, *supra* and *Skidmore* v. *Swift & Co.*, *supra*, as authority for its holding.

A resolution of the differences between the Courts of Appeals will create certainty in an area in which certainty is essential, and will provide uniformity necessary to the proper administration of the Pay Act. Clarification of this Court's decisions in *Armour* v. *Wantock*, *supra* and *Skidmore* v. *Swift*, *supra*, is also essential to uniformity of interpretation by the divergent Courts of Appeals.

I

Conflicting Decisions In The Circuit Courts Of Appeals.

The Court of Appeals for the Seventh Circuit in *Bowers* v. *Remington Rand* (1946), 159 F. 2d 114, and in *Bell* v. *Porter* (1946), 159 F. 2d 117, held that sleeping and eating time is not to be counted as working time and is not compensable. Both cases cited the decisions of this Court in *Armour* and in *Skidmore* as authority for so holding.

The Court below held that sleeping and eating time is not working time and is not compensable, citing the decisions of this Court in *Armour* and in *Skidmore*, and the decisions of the Court of Appeals for the Seventh Circuit in *Bowers* v. *Remington Rand, supra*, and *Bell* v. *Porter, supra*, as its authority for so holding.

The Court of Appeals for the Eighth Circuit, in *Rokey* v. *Day & Zimmerman* (1946), 157 F. 2d 734, held that sleeping and eating time is not working time, citing the decisions of this Court in *Armour* and in *Skidmore* as its authority for so holding.

CONTRA. More recently, in *General Electric Co.* v. *Porter* (1953), 208 F. 2d 805, the Court of Appeals for the Ninth Circuit, after considering the contrary holdings in the Seventh Circuit (*Bowers* v. *Remington Rand, supra*; *Bell* v. *Porter, supra*) and in the Eighth Circuit (*Rokey* v. *Day & Zimmerman, supra*) and other contrary decisions of district courts, expressly stated that (it is) "our holding that the firemen are entitled to compensation for sleeping and eating time" and rested its authority for so holding squarely upon the decisions of this Court in *Armour* and in *Skidmore*.

In *Biggs* v. *Joshua Hendy Corporation* (1950), 183 F. 2d 515, the Court of Appeals for the Ninth Circuit held that hours of standby duty devoted to eating are compensable, saying: "He was on call at all times and time thus spent was compensable under the Fair Labor Standards Act. *Armour*

& Co. v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134."

Two years subsequent to its holding in *Rokey* v. *Day & Zimmerman*, *supra*, the Court of Appeals for the Eighth Circuit in *Central Missouri Telephone Co.* v. *Councell* (1948), 170 F. 2d 641, held that sleeping time on standby duty is compensable upon the authority of this Court's decisions in *Armour* and in *Skidmore*.

In *F. W. Stock & Sons* v. *Thompson* (1952), 194 F. 2d 493, the Court of Appeals for the Sixth Circuit held that standby time during a period "designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the Fair Labor Standards Act. This conclusion is supported by *Armour* v. *Wantock*, 323 U. S. 126 . . . ."

Still more recently (1955) the Court of Appeals for the Fifth Circuit, in *Mitchell* v. *Strickland Transportation Co.*, 228 F. 2d 124, after considering the contrary holding in *Rokey* v. *Day & Zimmerman* (8 Cir.), held that all standby time was working time, without deduction for sleeping time, following *General Electric Co.* v. *Porter* (9 Cir.), *supra*, which was decided upon the authority of this Court's decisions in *Armour* and in *Skidmore*.

The area of uncertainty is extended by the additional circumstance that application for certiorari to the Court of Appeals for the Seventh Circuit was denied in the cases of *Bowers* v. *Remington Rand*, *supra* (330 U. S. 843, 1947), and *Bell* v. *Porter*, *supra* (330 U. S. 813, 1947), which held sleep-time non-compensable. Certiorari to the Eighth Circuit on a similar holding was also denied by this Court in *Rokey* v. *Day & Zimmerman*, *supra* (330 U. S. 842, 1947).

The Court of Appeals for the Ninth Circuit, in *General Electric Co.* v. *Porter*, *supra*, took note of the fact that certiorari to the Seventh and Eighth Circuits had been denied by this Court in those cases which held sleeping and eating time non-compensable (*Bowers* v. *Remington Rand*, *supra*; *Bell* v. *Porter*, *supra*; *Rokey* v. *Day & Zimmerman*, *supra*),

but the Court in the Ninth Circuit nevertheless held such time to be compensable in *General Electric Co.*

The application for certiorari to the Court of Appeals for the Ninth Circuit in *General Electric Co.* v. *Porter*, *supra*, was denied by this Court in 347 U. S. 951 (1954).

The decisions of the Courts of Appeals as to the compensability of sleeping and eating time are irreconcilably in conflict with each other. The interpretations of this Court's decisions in *Armour* and in *Skidmore* by the Courts of Appeals in these circuits are diametrically opposed to each other. The denial of certiorari to the conflicting circuits leaves the question unsettled.

Time devoted to sleeping and eating during standby duty cannot at the same time be both compensable and non-compensable under the same statute upon the authority of the same decision by this Court.

This anomalous situation presents a question of Federal law which has not been but should be settled by the Supreme Court.

II

The Decision Below Is Contrary To The Applicable Decisions Of This Court.

The decision below in this case is not in harmony with this Court's decisions in *Armour & Co.* v. *Wantock*, *supra*, or with *Skidmore* v. *Swift & Co.*, *supra*, and is in conflict with *General Electric Co.* v. *Porter* (CA 9, 1953), 208 F. 2d 805; with *F. W. Stock & Sons* v. *Thompson* (CA 6, 1952), 194 F. 2d 493; with *Central Missouri Telephone Co.* v. *Connell* (CA 8, 1948), 170 F. 2d 641; with *Biggs* v. *Joshua Hendy Corporation* (CA 9, 1950), 183 F. 2d 515; and with *Mitchell* v. *Strickland Transportation Co.* (CA 5, 1955), 228 F. 2d 124.

The Court below, in its decision in this case, said (Appendix A, p. 1a, *infra*.):

> "It is another case brought by firefighters claiming compensation for the time they were required to remain at their post of duty but during which they were permitted to eat and sleep. * * * Plaintiffs were in a standby status during all the time they were at their post. * * * Compensation for two-thirds of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295)."

The Court below accordingly dismissed plaintiffs' petition (Appendix A, p. 1a, *infra.*) saying:

> "On the authority of the opinion in *Merlin M. Armstrong, et al.* v. *United States*, No. 145-56, this day decided, plaintiffs' motion for summary judgment is overruled. Defendants' motion for summary judgment is granted, and plaintiffs' petition is dismissed."

In *Merlin M. Armstrong* (App. A, p. 3a, *infra.*), the Court below stated at the outset:

> "The basic question presented is what Congress meant by the words 'hours of employment.' Did it intend to include therein time during which an employed was required to remain on the employer's premises but during which he could eat or sleep?"

and the Court below decided that basic question by holding (Appendix A, p. 6a, *infra.*):

> "When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home."

This holding below is not in harmony with *Armour* v. *Wantock, supra,* or with *Skidmore* v. *Swift, supra.* The claims in those cases arose under the Fair Labor Standards Act, which like the Federal Employees Pay Act, required overtime pay for employment in excess of a certain number of hours each week.

In the *Armour* case, as in this case, the firefighters were on round-the-clock standby duty. They were subject to call at all times and were not permitted to leave the fire hall. The employer furnished sleeping quarters, pool tables, card tables, radio and other facilities for the convenience and amusement of the employees and while not on active duty they were permitted to sleep and eat and spend their time as they chose on the premises.

The employees contended in the District Court that all of such standby time however spent was employment time. The employer claimed that those hours in which active work was not performed was not employment time. The District Court held that the employees were entitled to be paid for all standby time except that hours spent sleeping and eating were not to be counted as employment time.

The employer appealed, but the employees took no appeal from the judgment insofar as it was adverse to them.

Prior to the time that *Armour's* appeal reached the Court of Appeals for the Seventh Circuit, the firefighters in *Skidmore's* case brought a similar action in which the District Court held that the employees were not entitled to recover for any standby time and on appeal the Court of Appeals for the Fifth Circuit affirmed (136 F. 2d 112), holding that the employees were not "working" merely because they agreed to stay on the employer's premises and be available in case of alarm. "'Working' is not synonymous with 'availability for work'" it held.

When *Armour's* appeal from the District Court reached the Court of Appeals for the Seventh Circuit, *Skidmore's* appeal had already been decided in the Fifth Circuit, and the latter

decision was strongly urged by *Armour* as the controlling law.

In that regard the Court of Appeals in *Armour's* case, said (140 F. 2d 356):

> "Two questions are raised:
>
> (a) * * *
>
> (b) Did plaintiffs work in excess of the maximum hours permitted by Title 29, Sec. 207, U. S. C. A., without payment of overtime wages.
>
> * * * * * *
>
> "(b) On the second question the appellant relies heavily on *Skidmore* v. *Swift*, 5 Cir., 136 F. 2d 112 * * *.
>
> "It seems to us that the question is one which only the Court of last resort can answer finally and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court."

"Our conclusion" in the Seventh Circuit was to reject the concept of *Skidmore* that "work is not synonymous with availability for work", the Court of Appeals in *Armour* saying:

> "The only legal question, as we see it, is therefore directed to the ascertainment of the *legal status of the plaintiff to the defendant during the periods when they were subject to call* as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that *their legal status was that of employee during that time*." (Italics added.)

Concerning so much of the District Court's decision in *Armour* as held that standby time devoted to playing cards or listening to the radio was working time but that standby

time devoted to sleeping and eating was not to be counted as working time, the Court of Appeals in the Seventh Circuit said:

> "Inconsistency is at once suggested when a distinction is made between an employee living in the packing house, who is subject to call, but who is sleeping, and one who is subject to call, and is listening to the radio or playing solitaire. The correctness of the district court's holding that time devoted to sleeping and eating should not be counted as part of overtime, is not before us. The employees have not appealed from that part of the judgment which is adverse to them. Therefore no question of difference between sleeping and eating on the one side and playing solitaire, listening to the radio or reading on the other hand are before us."

On certiorari, this Court affirmed *Armour* and reversed *Skidmore* and it remains to consider the *rationale* upon which the affirmance and the reversal turned in those cases, both of which were decided by this Court on the same day.

This Court summarized *Armour's* contention on certiorari as follows:

> "On these facts the petitioner contends: first . . . and, second, that even if they were within the Act time spent in sleeping, eating, playing cards, listening to the radio or otherwise amusing themselves, cannot be counted as working time." (*Ibid.* p. 128).

In the consideration of the question thus presented, this Court framed the issue as follows:

> "Second. Was it error to count time spent in playing cards and other amusements, or in idleness, as working time?" (*Ibid*, p. 132).

In answer to this question, this Court in *Armour* said:

> "The overtime provisions of the Act * * * apply only to those who are 'employees' and to 'employment' in excess of the specified hours; * * * Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites statements that the congressional intent was 'to guarantee either regular or overtime compensation for all *actual work* or employment' and that 'Congress here was referring to work or employment * * * as those words are commonly used—*as meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business'." (Italics by the Court.) (*Ibid.* p. 132).

This interpretation by the petitioner Armour of the Congressional intent as to what constitutes compensable hours of employment (which is the counterpart of the interpretation by the Court of Claims below in this case),[2] was rejected by this Court as follows:

> "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a standby capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether

[2] "When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home." (*Armstrong v. United States*, Appendix A, p. 6a, *infra*.)

time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances in the case.

That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 119; 58 L. Ed. 144, 147, 34 S. Ct. 26, the Court held that inactive time was to be counted in applying a Federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court said, 'In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait'."

It would thus seem clear that this Court's pronouncement that

> "Readiness to serve may be hired quite as much as service itself"

constitutes the basis of decision where readiness to serve is the essential ingredient of every moment of standby duty.

This is exemplified by this Court's quotation, in *Armour*, from Mr. Justice Holmes' decision in *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112 (p. 133 in *Armour*). That quotation, "Under orders, liable to be called upon at any moment and not at liberty to go away" would thus appear to be the foundation upon which this Court has rested the concept that hours of standby duty, however spent, are hours of employment, and compensable as such.

In *Skidmore* v. *Swift*, *supra*, the Court of Appeals in the Fifth Circuit said:

> "These facts give rise to the inquiry whether under the Fair Labor Standards Act an employee is working when he is sleeping, playing pool, dominoes, or the radio merely because he has agreed to stay on the employer's premises and be available in case of an alarm. * * * One must sleep whether at home or abroad, nor is he at work when he is asleep. * * * 'Working' is not synonymous with 'availability for work'."

This is precisely what the Court below held, and this is precisely the concept that was rejected by this Court in *Armour*, and this Court, in reversing the Court of Appeals in *Skidmore*, said:

> "For the reasons set forth in the *Armour & Co.* case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time." (*Ibid.* at p. 136).

Nevertheless, those courts which have denied compensation for sleeping and eating time have done so upon the *concept* that such portion of waiting time is *precluded* from being working time, the direct antithesis of the holding of this Court in *Skidmore* in the paragraph just above quoted.

If the *rationale* of *Armour* is that when employees are on the alert, during all the hours of their employment (which is the meaning and definition of "standby"), the requirement of their employment is such that they must at once respond to the alarm whether they are playing dominoes or cards, or merely idling away their time, and because of that compulsion their standby hours are compensable hours of employment, then it would seem illogical to suggest that in the light of such a holding an employee's time is compensable when he is required to leave the card table to respond to the alarm, but is not compensable when he is required to leave the luncheon table to respond to the alarm, since a distinction will need to be made between a card table and a luncheon table as a standard by which to grant compensation in one case and deny it in the other.

III

The Construction Of The Pay Act Presents A Question Of Federal Law Which Has Not Been But Should Be Settled By The Supreme Court.

The Court below has declared it to be a rule of general application that one-third of standby time is to be excluded in all cases, regardless of the facts, and that this is "a sensible construction of the Federal Employees Pay Act of 1945."

In *General Electric Co., supra,* after quoting at length from this Court's decisions in *Armour* and *Skidmore*, the Court in the Ninth Circuit said:

> "It is apparent from the above language (in Armour and Skidmore) that whether or not sleeping time falls within the Act depends upon the express or implied agreement of the parties, and in the absence of an agreement, the nature of the service and its relation to the waiting time." (Matter in brackets added) (*Ibid.* at p. 814).

The Court below gave no consideration to the presence or absence of an agreement as to sleeping time, express or implied, either in the case at bar or in the *Armstrong* case upon the authority of which this case was dismissed.

> "There is no surer way to find out what parties meant, than to see what they have done." (*Brooklyn Life Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273; *Manhattan Life Insurance Co.* v. *Wright,* (C. C. A.), 126 F. 82, 87.)

In considering "what they have done", it is necessary to consider that following this Court's decision in *Armour*, the Administrator promulgated the following Regulation governing all Civilian Personnel:

"N.C.P.I.-85.4-4:[3] STANDBY DUTY:—When an employee is placed in a standby status he is placed in a duty status which, under decisions of the Supreme Court (323 U. S. 126), is subject to compensation. As here used, 'standby status' and 'standby duty' are synonymous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."

Plaintiffs were on standby duty during all the time they were at their post, and N.C.P.I. 85.4-4 is applicable to their employment. It is so stipulated (R. pp. 32, 34).

Accordingly, civilians employed under the N.C.P.I. 85.4-4 Regulation would not fall within the ambit of the *Bowers, Bell* and *Rokey* cases (*supra*) in the Seventh and Eighth Circuits (where sleeping time was disallowed because the employment contract in those cases expressly provided that the employees would be paid only sixteen out of the twenty-four hours they were on post),[3] since, in N.C.P.I. 85.4-4 cases the Regulation specifically provides that *all* standby time is "work for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."

---

[3] This circumstance was considered to be the distinguishing and controlling factor by the Court of Appeals for the Ninth Circuit in *General Electric Co.* v. *Porter*, where the Court stated (208 F. 2d at p. 815):

"The absence of an express or implied agreement in this case as to sleeping time * * * distinguishes this case from those instances where sleeping time has been disallowed. *Bowers* v. *Remington Rand*, 7 Cir. (1946), 159 F. 2d 114, cert. den. 331 U. S. 864; *Rokey* v. *Day & Zimmerman*, 8 Cir., (1946), 157 F. 2d 734, cert. den. 330 U. S. 842.

In cases where sleeping time has been denied as compensable work time the employees had voluntarily entered into employment contracts which expressly provided that they would be paid only sixteen out of the twenty-four hours they were required to remain on the employer's premises subject to call. *Bell* v. *Porter*, 7 Cir. 1946, 159 F. 2d 117, cert. den. 330 U. S. 813 * * *."

If *all* standby time, including sleeping time, is working time under the Administrative Regulation, and if "all hours of employment" are compensable under the Pay Act, then, in declaring only two-thirds of the time on duty to be compensable the Court will necessarily have assumed the legislative function.

This presents an important question of federal law which has not been but ought to be settled by the Supreme Court.

CONCLUSION

As matters presently stand, the law is unsettled to such extent that the right of Federal civilian employees to compensation under the same statute depends upon the circuit in which their claim is presented, and whether relief be granted in one case or denied in the other, the outcome in each is founded upon this Court's decision as authority whichever way the case goes. This is an unseemly state of the law.

The petition for certiorari should therefore be granted.

Dated, New York, April 1, 1959.

Respectfully submitted,

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Attorney for Petitioners.

Certificate of Service

I, OTIS MARK WATERS attorney for petitioners in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 8th day of April, 1959, pursuant to Rule 33(2) of the Rules of this Court, I served copies of the foregoing petition for a writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in a duly addressed envelope, with postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D.C., the attorney for the Respondent.

Dated, April 8th, 1959.

OTIS MARK WATERS,
Attorney for Petitioners.

APPENDIX A

Opinion and Judgment Below

(Caption Omitted)

No. 232—57

(Decided January 14, 1959)

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

PER CURIAM: This case is before the Court on plaintiffs' and defendant's motions for summary judgment. It is another case brought by firefighters claiming compensation for the time they were required to remain at their post of duty but during which they were permitted to eat and sleep.

On the authority of the opinion in *Merlin M. Armstrong, et al.* v. *United States*, No. 145—56, this day decided, plaintiffs' motion for summary judgment is overruled. Defendant's motion for summary judgment is granted, and plaintiffs' petition is dismissed.

Defendant files counterclaims seeking to recover from plaintiffs on the theory that more than eight hours were set apart for eating and sleeping, for which plaintiffs have been paid.

Plaintiffs were in a standby status during all the time they were at their post, and, although they might have slept more than the eight hours for which they were not paid, we think they are nevertheless entitled to compensation therefor, for the reasons set forth in the *Armstrong* case, *supra*, and other cases therein cited. Compensation for two-thirds of the 24 hours plaintiffs were on duty seems to us to be a sensible construction of the Federal Employees Pay Act of 1945 (59 Stat. 295).

Defendant's counterclaims are accordingly dismissed.

It is so ordered.

Appendix A

Opinion Below in Merlin M. Armstrong, et al.

No. 145—56

(Decided January 14, 1959)

MERLIN M. ARMSTRONG, ET AL. v. THE UNITED STATES

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

This case, brought by some 88 firefighters at the Tinker Air Force Base at Oklahoma City, Oklahoma, involves their right to compensation for the time they were required to spend on the employer's premises, subject to call, but during which they were permitted to eat or sleep.

The case arises under the Federal Employees Pay Act of 1945 (59 Stat. 295), and, for a portion of the period, under the amendment thereof on September 1, 1954, designated the Premium Pay Act (68 Stat. 1114; 5 U. S. C. 926).

1. Section 201 of the Federal Employees Pay Act of 1945 reads, in part, as follows:

> "Section 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment officially ordered or approved, in excess of forty hours in any administrative work week, at overtime rates, as follows * * *.
>
> [For employees receiving compensation of less than $2980 per annum, the overtime was one and one-half times the basic hourly rate of compensation, but, as the basic salary increased, the percentage of the basic rate for overtime decreased.]

Appendix A

The basic question presented is what Congress meant by the words, "hours of employment." Did it intend to include therein time during which an employee was required to remain on the employer's premises but during which he could eat or sleep?

The first cases to reach the courts, in which the meaning of the words was in issue, were *Wantock v. Armour & Co.*, 140 F. 2d 356; 323 U. S. 126; and *Skidmore, et al. v. Swift & Co.*, 136 F. 2d 112; 323 U. S. 134. They involved claims of firefighters for compensation for all the time they were required to remain on the employer's premises in a standby status, including sleeping and eating time. They arose under the Fair Labor Standards Act, but this Act, as also the Federal Employees Pay Act, required overtime pay for "employment" beyond a certain number of hours. In both cases the employees claimed that all standby time should be included in hours of employment, even though a part of it was spent in eating and sleeping. The employer claimed that, since no labor was performed in any standby time, the employee was not entitled to compensation therefor.

In *Wantock v. Armour & Co., supra,* the District Court held that the employee was entitled to be paid for all standby time, except that spent in eating and sleeping. The employer appealed, but the employee did not. The Court of Appeals for the Seventh Circuit affirmed, 140 F. 2d 356, and the Supreme Court affirmed, 323 U. S. 126.

This case is authority for the right of the employee to recover compensation for standby time that does not include eating and sleeping time. His right to recover for eating and sleeping time was decided only by the District Court, which held he could not recover therefor.

In *Skidmore, et al. v. Swift & Co., supra*, the District Court held that the employees were not entitled to recover for any standby time, and the Court of Appeals for the Fifth Circuit affirmed, 136 F. 2d 112. On certiorari by the Supreme Court

the lower courts were reversed, 323 U. S. 134. The Supreme Court held that an employee might have the right to recover for standby time, depending on the facts of the particular case, and it remanded the case for findings of fact and for further proceedings. It did not specifically decide whether or not recovery could be had for time spent in eating and sleeping, but it clearly intimated that it could not be.

On pages 138-140 the Supreme Court summarizes Interpretative Bulletin 13 of the Wages and Hours Division, and discusses the weight to be given to it. After summarizing this bulletin the Supreme Court, at page 139, said:

> The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

It then discusses the weight to be given to the views of the Administrator, and concludes,

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while

> not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. • • •

In conclusion it noted: "The courts in the *Armour* case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith."

Since these decisions, employees have been compensated for standby time, although no work was performed therein, but they have been denied compensation for time spent in sleeping and eating, although during that time they were subject to call. It has been generally understood that this was in accord with the clear intimation of the Supreme Court in the above cases, that an employee was not entitled to compensation for time spent in sleeping and eating, merely because such time was subject to possible interruptions.

This has been the uniform holding of our court, except in two cases where substantial labor was performed during the time set aside for sleeping and eating. *Winsberg* v. *United States,* 120 C. Cls. 511, under the Overtime Pay Act; *Gaetke* v. *United States,* 136 C. Cls. 756; *Collins* v. *United States,* No. 141-56, and *Avary* v. *United States,* No. 266—56, both decided on March 5, 1958; and *Ahearn, et al.* v. *United States,* No. 332—55, decided May 7, 1958, all under the Federal Employees Pay Act.

In *Farley* v. *United States,* 131 C. Cls. 776, and in *England* v. *United States,* 133 C. Cls. 768, compensation was allowed because substantial labor was performed during the time set apart for sleeping and eating.

The Court of Appeals for the Seventh Circuit has been of the same opinion. In addition to *Wantock* v. *Armour & Co., supra*, see *Bowers* v. *Remington Rand,* 159 F. 2d 114, and *Bell* v. *Porter,* 159 F. 2d 117, decided after the Supreme Court's opinion in *Wantock* v. *Armour & Co., supra.*

Appendix A

The contract between the Alaska Railroad and its fire fighters provided for overtime for standby time, except for eating and sleeping time, for which no compensation was to be paid. Of the total time spent on the employer's premises two-thirds were compensable, and one-third, not compensable. In *Gaetke, et al.* v. *United States, supra*, we said that this voluntary agreement between employer and employee "was a sensible and realistic application of the statute [The Federal Employees Pay Act] to the peculiar requirements of plaintiffs' jobs."

Later, the Civil Service Commission, which, by section 603 of the Federal Employees Pay Act, was given power to make regulations, promulgated a regulation of the same tenor as the contract in the *Gaetke* case, to wit, compensation for two-thirds of the time spent on the employer's premises, and no compensation for eating and sleeping time.

The Comptroller General approved payments made in accordance with the rule. 25 Comp. Gen. 161.

There is thus respectable authority for the exclusion of eating and sleeping time from compensable time spent on the employer's premises: first, the contract between employer and employee, involved in the *Gaetke* case; second, the Civil Service Commission regulation; third, the ruling of the Comptroller General; fourth, the decisions of the Court of Appeals of the Seventh Circuit, and of this court; and, fifth, the clear intimation of approval by the Supreme Court in *Skidmore* v. *Swift & Co., supra*. Lastly, we think Congress in the Premium Pay Act of 1954, has given implied approval of the principle underlying the Civil Service regulation. That Act permits a maximum of 25 percent premium pay for standby time. Under the formula of the Civil Service Regulations a firefighter gets paid from 20 percent to 33⅓ percent for his standby time; he receives nothing for eating and sleeping time. (The variance in the percentage depends on his basic pay.)

If these employees are compensated in accord with the Civil Service Regulations and without previous holdings, they will get approximately the same as what they would get under the Premium Pay Act of 1954.

Not only is this ruling supported by authority, it seems to us to be "a sensible and realistic application of the statute to the peculiar requirements of plaintiffs' jobs." When Congress passed the Federal Employees Pay Act, we doubt it had in mind the peculiar situation of firefighters, but it does not seem to us reasonable to suppose it meant to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home. This seems so even if he was subject to call during his sleeping and eating time, and if he was in fact called, provided that he was paid for all hours, except those during which he was actually free to eat and sleep.

We feel assured, therefore, that the regulation of the Civil Service Commission gives effect to the fundamental intent of Congress to fairly and justly compensate Federal employees for their services to the Government. We cannot believe that Congress meant to compensate them for time spent in sleeping on the job. If eight hours out of the 24 were allowed for sleeping and eating, these plaintiffs have been fully compensated.

What are the facts in this case?

Plaintiffs were on duty on alternate days for 24 hours a day, a total of 72 hours per week. For 40 hours plaintiffs were paid straight time, and for an additional 8 hours they were paid overtime at the statutory rate. For the balance of the time, which was supposed to be devoted to eating and sleeping, they were paid nothing. Plaintiffs were not permitted to sleep during the daytime, but they were permitted to do so from 8 p.m. to 7 a.m., unless during that time some emergency prevented. As a matter of choice, however, many of the plaintiffs retired between 11 p.m. and midnight.

Appendix A

Logs were kept of emergency calls during the time set apart for sleep. These logs do not seem to be as accurate as we would like, but, such as they are, they show a total of about 266 interruptions during sleeping hours in 1954 for "emergency landings", "crash standby and fireguard", "gasoline wash down" and "false alarms", 208 for 1955, and 238 for 1956. All three stations had to respond to an emergency landing alarm. Each such alarm consumed about 20 minutes. There were an average of about 50 per year. Thus approximately 17 hours per year were consumed in answering such alarms. The other alarms consumed from 15 to 30 minutes. Ordinarily only a part of the men from one station answered the other alarms. The average number per year was about 190, or something over 60 per station. If we allow 30 minutes for each alarm, this eans 30 hours per year. At a maximum, not more than 50 hours per year, or about one hour per week, are to be deducted from the 11 hours of sleeping time for these interruptions. The miscellaneous interruptions were inconsequential, consuming the time of only one man, probably once a year.

The findings also show that each fireman had to stand watch one hour each night. This makes a total of not more than two hours to be deducted from the time set apart for sleeping. This would leave a total of 9 hours during which plaintiffs were permitted to sleep. In addition to this, they were allowed two hours for eating. Thus, the total time for eating and sleeping was probably about 11 hours out of the 24. There can be no doubt that these plaintiffs were allowed much more than 8 hours for eating and sleeping and, therefore, that they have been compensated for all hours spent in a duty status, except for eating and sleeping time.

The Premium Pay Act of September 1, 1954, *supra*, necessitated the keeping of an accurate account of the number of hours of actual work. The chief of the Fire Protection and Aircraft Crash Rescue Branch, Installations Division, and

the chief of the Fire Department and his two assistants, made a calculation of the actual number of hours the firemen worked. (The two assistant chiefs are plaintiffs in this case.) This computation shows that on the average each firefighter worked 32.55 hours per week. Under the Civil Service Regulation in effect prior to September 1, 1954, they have been paid for 48 hours per week.

It would appear, therefore, that plaintiffs have been compensated for all work actually performed and for all time in a standby status, except for 8 hours set apart for eating and sleeping. Since, in fact, plaintiffs were allowed more than 8 hours for eating and sleeping, they have been fully compensated under the Federal Employees Pay Act of 1945, *supra*.

2. After the passage of the Premium Pay Act of September 1, 1954; *supra*, some of the plaintiffs elected to come within its provisions, but they now claim compensation on the same basis as the other plaintiffs, because of the provisions of section 401 (b) of the Premium Pay Act, which reads: "Nothing contained in this section shall be construed to decrease the existing aggregate rate of compensation of any present employee * * *." However, inasmuch as we have held that under the rate of compensation in effect prior to the passage of the Premium Pay Act of 1954 plaintiffs are not entitled to recover, we do not need to consider the other provisions of the Premium Pay Act.

It results that plaintiffs are not entitled to recover and their petition will be dismissed.

It is so ordered.

EDGERTON, *Circuit Judge*, sitting by designation; LARAMORE, *Judge*; MADDEN, *Judge*, and JONES, *Chief Judge*, concur.